PD-0477-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/7/2019 10:20 PM
Accepted 10/8/2019 11:36 AM
DEANA WILLIAMSON
CLERK

No. PD-0477-19

FILED
COURT OF CRIMINAL APPEALS
10/8/2019
DEANA WILLIAMSON, CLERK

In the

Court of Criminal Appeals of Texas

Austin, Texas

ISSAC WILLIAMS,
Appellant-Respondent

v.

STATE OF TEXAS,
Appellee-Petitioner

On the State's petition for discretionary review from the Fourth Court of Appeals, San Antonio, Texas

Appellate Cause No. 04-17-00815-CR

Appealed from a judgment of conviction in the 187th Judicial District Court Bexar County, Texas

Trial Cause No. 2014-CR-8370B

STATE'S BRIEF ON THE MERITS

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Trial Judge:	THE HONORABLE JOEY CONTRERAS (trial) THE HONORABLE STEVE HILBIG (pretrial hearings) THE HONORABLE RAYMOND ANGELINI (pretrial hearings) 187th Judicial District, Bexar County
Panel of the Fourth Court of Appeals:	THE HONORABLE SANDEE BRYAN MARION, *Chief Justice* THE HONORABLE PATRICIA O. ALVAREZ, *Justice* THE HONORABLE LIZA A.RODRIGUEZ, *Justice* Author of the Opinion

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STATEMENT OF THE CASE

Issac Williams was charged by indictment with the offense of continuously trafficking a child for more than 30 days (C.R. at 5). *See* TEX. PENAL CODE §§ 20A.03(a) & 43.05(a)(2). A jury found Williams guilty (VII R.R. at 67). The trial court pronounced sentence on December 4, 2017 (VIII R.R. at 144) and certified his right to appeal (C.R. at 388). On April 10, the court of appeals reversed the trial court's judgment of conviction due to jury charge error. *Williams v. State*, No. 04-17-00815-CR, ___ S.W.3d ___, 2019 Tex. App. LEXIS 2872, 2019 WL 1548600 (Tex. App.—San Antonio 2019, pet. filed). This Court granted the State's petition for discretionary review on August 21, 2019. This brief is due by October 7, 2019.

GROUNDS FOR REVIEW

Ground One: Did Williams preserve his request for the lesser-included offense of human trafficking when he failed to identify any evidence supporting this request and denied committing any offense?

Ground Two: Did the court of appeals err by concluding that the lesser-included offense of human trafficking was a rational alternative to continuous human trafficking?

Ground Three: Did the court of appeals err by automatically reversing Williams' conviction rather than applying the standard required by *Almanza*?

STATEMENT OF FACTS

In December of 2013, Williams met B.F., the minor alleged in the indictment, and solicited her to be a prostitute (III R.R. 38–49; State's Ex. 11). *Williams*, at *2. Williams took provocative pictures of B.F. and posted them on the website backpage.com (III R.R. at 51–53). *Id.* at *3–4. During this time, Williams introduced B.F. to Deborah Cooper, also known as Kandy or Ameia (III R.R. at 49). *Id*. The backpage.com ads featured Cooper as "Kandy" and B.F. as "Amber" and ran from December 2013 until August 2014 (State's Ex. 1, Vol. 9.1 at 21–Vol. 9.13 at 293). *Id.* at 4, 7. Most of the ads were invoiced to "Kandy," however, some of the ads from July 20 through August 5, 2014 were invoiced to "Issac Williams." *Id.* at 7. Williams drove B.F. to different cities along the Interstate 35 corridor so that she could earn money as a prostitute (III R.R. at 71–72). Williams kept most of the money (III R.R. at 73–75).

While B.F. was being prostituted by Williams, she was also under the supervision of a Bell County District Court for juvenile delinquency and the subject of a directive to apprehend (IV R.R. at 101, Court's Ex. 1, Vo. 9.1 at 11–17; State's Ex. 2, Vol. 9.1 at 18–20).

Meanwhile, investigators with the Department of Public Safety were perusing backpage.com looking for ads that seemingly featured minors (III R.R. at 208–10). *Id.* at 7. Agent Shawn Hallett concluded that "Amber" was B.F. and that

she was a minor (III R.R. at 212). *Id.* Using the contact information in the ad, he called "Kandy" (Cooper) and arranged a session with the girls at a hotel in Killeen (III R.R. at 216–20). *Id.* at 7–8. At the sheduled time, a team of DPS agents apprehended Cooper and located B.F. in a hotel room with multiple cell phones and a box of condoms (III R.R. at 220–25). *Id.* at 8. Agent Stormey Jackson interviewed B.F., who revealed the details of Cooper and Williams' trafficking scheme (III R.R. at 225). *Id*.

As B.F. was leaving the hotel with the agents, Williams drove into the parking lot (III R.R. at 226). *Id.* B.F. became visibly upset when she directed the agents' attention to Williams (III R.R. at 227). Williams was arrested and agents found multiple cell phones, gift cards, and condoms on his person and in his car (III R.R. at 233–35). *Id.* at 9.

One of the phones found in Williams' car (device 6) had a history of activity on backpage.com going back to May 2014 (III R.R. at 235; State's Ex. 11, 9.15 R.R. at 45; State's Ex. 11c, 9.15 R.R. at 67–142). A gift card in Williams' possession was linked to purchases for ads on backpage.com and hotel room rentals (IV R.R. at 52–53).

Williams testified in his defense. He denied knowledge that Cooper and B.F. were engaging in prostitution (VI R.R. at 210, 225). He denied any responsibility for causing B.F. to engage in prostitution (VI R.R. at 168–169). He

offered a slew of excuses as to why incriminating evidence was found on his phone or in his car (VI R.R. at 130, 228, 252–53). *Id.* at 13–15. At no time did Williams directly admit or infer that he only trafficked B.F. for less than 30 days.

The jury found Williams guilty of the charged offense and sentenced him to fifty years confinement (VIII R.R. at 144).

SUMMARY OF THE ARGUMENT

Williams did not preserve error for review because, when asked by the trial court, he failed to point to any evidence supporting a lesser-included offense of human trafficking. Furthermore, Williams denied committing any offense whatsoever. The evidence relied on by the court of appeals to support a reversal was presented to the jury in the context of Williams' denial. The evidence does not rationally support a finding of guilt on a lesser-included offense. Finally, the court of appeals erred by not reviewing the record for harm. The presentation of evidence and arguments of counsel do not contain any explicit or implicit suggestions that Williams was only guilty of a lesser offense. Additionally, the record as a whole does not show that Williams pursued a lesser-included offense theory at all. His defensive theory was that he was wholly innocent. Thus, the record only contains theoretical harm.

ARGUMENT

Ground One: Did Williams preserve his request for the lesser-included offense of human trafficking when he failed to identify any evidence supporting this request and denied committing any offense?

Applicable Law: Article 36.14 and Error Preservation

While a trial court has an independent duty to give the jury the law applicable to the case, it does not have a duty to *sua sponte* instruct the jury on defensive issues. *Posey v. State*, 966 S.W.2d 57, 61 (Tex. Crim. App. 1998). Defensive issues may be preserved either by an objection or by requesting a special instruction. *Chase v. State*, 448 S.W.3d 6, 12–13 (Tex. Crim. App. 2014); *Vasquez v. State*, 919 S.W.2d 433, 435 (Tex. Crim. App. 1996). A lesser-included offense instruction is a defensive issue that requires an objection.[1] *Tolbert v. State*, 306 S.W.3d 776, 781 (Tex. Crim. App. 2010).

Generally, an objection does not require special or magical words; "all the party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly

[1] The Code of Criminal Procedure contains two provisions under which a defendant may request that additional instructions be placed in the jury charge. Under article 36.14, a defendant may lodge an objection before the trial court. TEX. CODE CRIM. PROC. art. 36.14. Under article 36.15, a defendant may make a request by either submitting a special issue in writing, or by orally dictating the proposed charge into the record. *Id.* at art. 36.15. In this case, Williams objected to the absence of a series of lesser offense; he did not, however, submit a proposal in writing nor did he dictate his proposed charge into the record (VII R.R. at 7–8). Accordingly, article 36.15 is not implicated by this case.

enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Layton v. State*, 280 S.W.3d 235, 239 (Tex. Crim. App. 2009) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)). The purpose of an objection is to give the trial judge an opportunity to cure or prevent any alleged error. *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977). So, while formal language is not required, the objection must be clear enough for the judge to understand what relief is requested and why the defendant is legally entitled to it. *See Lovill v. State*, 319 S.W.3d 687, 692–93 (Tex. Crim. App. 2009) (concluding that error was not preserved because trial judge's statements on the record indicate that she did not understand the complaint); *Stone v. State*, 703 S.W.2d 652 (Tex. Crim. App. 1986) (special request pursuant to article 36.15 was sufficient because it apprised the trial court to the alleged error in the jury charge).

How clear must an objection be if a defendant is asking the judge to include a lesser-included offense in the jury charge? The answer should be found in the test used to determine when a defendant is entitled to a lesser-included offense instruction. Under that test, the defendant is entitled to an instruction on a lesser-included offense when the record contains some evidence that the defendant is guilty of only that offense. *Bullock v. State*, 509 S.W.3d 921, 924–25 (Tex. Crim. App. 2016).

Thus, a defendant who lodges an objection under article 36.14 to a proposed jury charge should provide the trial court with an explanation as to why he believes the evidence supports that charge.

Application to the Record: Williams did not preserve error because he did not give the trial judge a sufficient explanation as to why he was entitled to the defensive issue.

After the conclusion of testimony, the trial court conferred with the parties about the jury charge and the following exchange took place:

> TRIAL COUNSEL: In this charge, we are asking that the lesser-includeds be placed in the charge. If we go through the definition of the charge, there are elements that we talked about in the informal charge conference: Human trafficking, compelling prostitution, prostitution, and then, there was evidence of a simple assault. So we believe that there is sufficient evidence for the jury to look at any one of those theories and find a lesser-included, and we ask for those charges to be -- the lesser-included --
>
> THE COURT: Is there -- was there any evidence elicited -- and refresh my memory -- that if he's guilty of any offense, he's guilty of the lesser only and not the greater?
>
> TRIAL COUNSEL: I believe there was in substance.
>
> THE COURT: Do --
>
> TRIAL COUNSEL: Okay. And then, the Court makes the ruling. It is what it is.
>
> THE COURT: Okay. That will be denied.

(VII R.R. at 7–8). Williams' counsel and the trial court then moved on to a separate issue in the charge.

Not only did Williams' counsel not identify the evidence relied on in his brief or by the court of appeals in its opinion, he refused to identify any evidence that would support the submission of a lesser-included offense instruction—let alone four different "lesser-included" instructions. The trial court had most recently heard testimony from Williams that amounted to a complete denial that he committed any offense at all (VI R.R. at 105–06). Williams denied knowing that Cooper or B.F. were engaging in prostitution (VI R.R. at 210, 225). He denied ever using the backpage.com website (VI R.R. at 210). This testimony, no doubt fresh on the trial court's memory at the time of Williams' request, amounts to a denial and not evidence that embraces a lesser offense.

Williams did not remind the trial court of the dates his name appeared on the backpage.com invoices, nor did he direct the trial judge to the text message contained in Defendant's Exhibit 7, nor did he point out that he had testified that his phone contained the history of backpage.com activity only because Cooper had "merged" her phone with his. While this evidence was relied on by Williams and the court of appeals, it was not identified before the trial court. In its place, Williams referred to the "substance" of the testimony in general and noted that "it is what it is" (VII R.R. at 7–8).

The present record demonstrates that Williams wholly failed to articulate why he was entitled to a lesser-included offense instruction under the relevant legal standard. *See Bullock*, 509 S.W.3d at 924–25 (second prong requires examination of evidence that defendant is guilty only of lesser-included offense); *Layton*, 280 S.W.3d at 239 (preservation of error requires party to sufficiently explain why they are entitled to a ruling).

Judge Cochran once succinctly illustrated this matter in a concurrence:

> A defendant is "entitled to" an instruction on a lesser offense if the proof for the offense charged includes the proof necessary to establish the lesser-included offense and there is "some evidence … in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense." *The defendant must point to specific evidence in the record* that negates the greater offense and raises the lesser-included offense.

Grey v. State, 298 S.W.3d 644, 653 (Tex. Crim. App. 2009) (Cochran, J., concurring) (emphasis added, citations omitted). Though Judge Cochran's concurrence was not about error preservation, her words encompass the basic notion of why an objection is important in a criminal trial. The passage also demonstrates how Williams' failure in the trial court should have precluded review on appeal because Williams did not point to any specific evidence to support his request of a lesser-included offense. *See Posey*, 966 S.W.2d at 61 (defensive issues require objections); *Tolbert*, 306 S.W.3d at 781 (lesser-included offense instruction is defensive issue that requires an objection).

Accordingly, the court of appeals erred to consider the merits of Williams' point of error. *Darcy v. State*, 488 S.W.3d 325, 327–28 (Tex. Crim. App. 2016) (error preservation is a systemic requirement).

Ground Two: Did the court of appeals err by concluding that the lesser-included offense of human trafficking was a rational alternative to continuous human trafficking?

Applicable Law: The second prong of the lesser-included offense test.

Under the second prong of the lesser-included test, a defendant must establish that the record contains evidence that the defendant is guilty only of a lesser-included offense. *Bullock*, 509 S.W.3d at 924–25. The evidence relied on must be a "valid rational alternative to the charged offense." *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011) (quoting *Segundo v. State*, 270 S.W.3d 79, 90–91 (Tex. Crim. App. 2008)); *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012). This Court has frequently noted that the standard may be satisfied "if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations." *Sweed*, 351 S.W.3d at 68; *Bullock*, 509 S.W.3d at 925. And "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; there must be some evidence directly germane to a lesser-included offense for the

factfinder to consider before an instruction on a lesser included offense is warranted." *Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994).

Bignall is another case where this Court concluded that a lesser-included offense instruction was merited even though the defendant denied committing a crime. *Bignall*, 887 S.W.2d at 24. In *Bignall*, this Court concluded that Bignall was entitled to a lesser-included instruction on theft because several witnesses testified either that no gun was used during a robbery or that no gun was found shortly after a robbery. *Id.* This Court did note that a defendant's general denial does not categorically bar him from requesting a lesser-included offense instruction. *Id.* That caveat notwithstanding, this Court remained committed to the notion that the defensive evidence must be of such a nature that it allows a rational jury to convict of the lesser offense. *Id.*

Application: The evidence does not show that Williams is guilty of only human trafficking for less than 30 days.

Williams' unequivocally denied criminal responsibility all together (VI R.R. at 168–169). In fact, he persistently denied any knowledge that Cooper and B.F. were engaging in prostitution (VI R.R. at 132–33, 168, 179, 188, 210, 225).

The court of appeals concluded that Williams should have been given an instruction for human trafficking based on the following evidence:

(1) Backpage.com invoices showed that his name only appeared on dates that were less than 30 days apart. *Williams*, at *21–22;

(2) Cooper sent B.F. a text message saying "make sure Issac doesn't see you." This message was sent prior to Williams' name appearing in the backpage.com invoices. *Id.* at *22;

(3) Williams testified that his phone was "merged" with Cooper's phone just prior to his arrest, which explained why the police found a history of backpage.com activity much longer than 30 days on his phone. *Id.* at *22–23.

From this evidence, the court of appeals concluded that a rational jury could have concluded that Williams "trafficked" B.F. for less than 30 days and that Cooper was responsible for the remaining time period going back to December 2013. *Id.* at *23.

But did it? The backpage.com invoices only show whose name was entered on the ad purchase. The invoices do not establish which individual entered the name. Nor are they directly germane to whether Williams "trafficked" B.F. In order to "traffic" another person, the actor must "transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means." TEX. PENAL CODE § 20A.01(4). The invoices do not establish that Williams "transported" B.F. at all, let alone within a period of 30 days. This fact was established by other evidence and not refuted by the ads (III R.R. at 71–72). The invoices do not establish who enticed or recruited B.F., but merely what occurred *after* she was enticed and recruited. The testimony shows that she was enticed and recruited in December of

2013 by Williams and the invoices do not refute this (III R.R. at 47–51). Nor do the invoices establish who harbored or provided for B.F. while she was a prostitute, or how she was "otherwise obtained." Instead, the ads show that B.F. was regularly advertised as a prostitute and the persons likely responsible for those ads were Cooper *and* Williams.

Even the court of appeals opinion suggests that the ads alone were not enough to establish "rational alternative" to the charged offense because the court also relied on the text message between B.F. and Cooper indicating that they did not want Williams to be aware of their activity on July 8, 2014 (V R.R. at 50; Vol. 9.16 at 18). However, this is one isolated text message in the midst of a voluminous record and the message does not identify what activity the two women are attempting to conceal. Given the entire record, it is far more rational to conclude that they were attempting to conceal something from a controlling pimp rather than an unsuspecting friend. But assuming that they were concealing prostitution activity from Williams in that instance, that single text message does not support a rational conclusion that Williams inexplicably went from being wholly innocent to being a human trafficker sometime between July 8 and July 20, 2014.

Finally, the court of appeals used portions of Williams' unequivocal denial as support for its conclusion that he was entitled an instruction on a lesser offense.

When asked why his phone had an extensive internet history of backpage.com, Williams testified that his and Kandy's phones were "merged" and that he did not access that website (VI R.R. at 228, 252–53). Contrary to the court of appeals' analysis, this evidence amounts to a denial and does not embrace the lesser-included offense.

The only case from this Court where the evidentiary basis for an instruction on a lesser-included offense was scrapped together with evidence from the prosecution and the defense is *Bullock*. In that recent case this Court held that a defendant charged with theft of a vehicle was entitled to an instruction on a lesser-included attempt, even though Bullock denied attempting to steal the vehicle. *Bullock*, 509 S.W.3d at 929. Similar to the instant case, this Court reasoned that the jury could have rationally arrived at its conclusion by accepting some portions of the State's evidence and some portions of Bullock's denial. *Id.* at 928–29.

Bullock, however, is distinguishable from the instant case in two important ways: First, Bullock admitted to thievish intent as well as entering the vehicle, while Williams, on the other hand, persistently denied any knowledge that B.F. was committing acts of prostitution. Second, although he admitted to entering the truck, Bullock denied placing his feet on the pedals or his hand on the ignition. Thus, Bullock offered testimony directly germane to the lesser attempted theft. *Id.* at 929. Again, Williams' testimony did not embrace any criminal conduct; it

categorically refuted responsibility. Thus, *Bullock*'s reasoning and holding should not extend to the present case.[2]

Finally, in concluding that Williams was entitled to an instruction on the lesser-included offense of human trafficking, the court of appeals analysis appears to turn on the mere possibility that a jury could have drawn this conclusion. Specifically, the court of appeals noted that "the likelihood of the jury actually making these conclusions is immaterial to the issue of whether Williams was entitled to an instruction on the lesser-included offense of trafficking of persons." *Williams*, at *23. The court of appeals supported this analysis by noting that a jury is free to disbelieve testimony. *Id.* (citing *Bignall*, 887 S.W.2d at 24; *Booth v. State*, 679 S.W.2d 498, 500 (Tex. Crim. App. 1984)). This analysis is not consistent with the second prong of the lesser-included offense test which requires the evidence amount to a rational alternative that the defendant is guilty only of the lesser offense.

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[2] Other courts of appeals addressing similar claims have required appellants to be more specific in their showing that they are guilty of only the lesser-included offense. *Casanova v. State*, No. 13-14-00145-CR, 2016 Tex. App. LEXIS 2725, at *13–16 (Tex. App.—Corpus Christi Mar. 17, 2016, no pet.) (mem. op., not designated for publication) (assault was not a rational alternative to continuous assault because Casanova denied committing any assaults and evidence did not establish that only one assault occurred); *Coleman v. State*, No. 11-11-00039-CR, Tex. App. LEXIS 2006, at *32–34 (Tex. App.—Eastland Feb. 28, 2013, no pet.) (mem. op. not designated for publication) (Coleman was not entitled to a lesser-included offense because the evidence did not distinguish between which acts of sexual assault occurred and which ones did not).

Whether a jury is free to believe or disbelieve testimony is a separate question as to whether the lesser-included offense amounts to a valid, rational alternative to the charged offense. For example, in *Cavazos*, this Court determined that Cavazos' statement that he did not mean to shoot anyone did not entitle him to a lesser-included offense of manslaughter in a murder trial. *Cavazos*, 382 S.W.3d at 385–86. This Court reasoned that Cavazos' admission, without more, could not provide the basis for a rational alternative to murder. *Id.*

The reasoning and outcome of *Cavazos* teaches that, while a reviewing court should not assign weight or credibility to evidence, it must address whether the evidence, taken at face value, is enough to support a rational conclusion that the person committed only the lesser. Without assessing his credibility, this Court arrived at the obvious conclusion that Cavazos' statement simply wasn't enough within the context of all the other evidence pointing to murder. Thus, a reviewing court may not conclude that any given testimony amounts to a "rational alternative" simply on the basis that it is prohibited from assessing the credibility of said testimony. In this case, Williams' persistent and absolute denial in the face of incriminating evidence from B.F. and the evidence found on his person and in his car should have been dispositive of the lesser-included analysis.

Critically missing from this trial record is any direct or circumstantial evidence explaining why or how Williams went from being an innocent and

ignorant man to participating in a human trafficking enterprise for less than thirty days. Missing along with this explanation is rationality—that is, it is irrational to believe that Williams did some of the trafficking, but not all of it.

The court of appeals erred to conclude otherwise. The State respectfully requests that this Court correct that error.

Ground Three: Did the court of appeals err by automatically reversing Williams' conviction rather than applying the standard required by *Almanza*?

Applicable Law: Almanza and Article 36.19.

When an appellate court finds error in the jury charge, "the judgement shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant." TEX. CODE CRIM. PROC. art. 36.19. When reviewing error in a jury charge, a court must examine "the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

The court of appeals reversed Williams' conviction without any review of the evidence or the argument of counsel or any other relevant information. *Williams*, at *23–24. The court of appeals ostensibly analyzed the harm "under the

standard enunciated in *Almanza*." *Williams*, at *23. However, *Almanza* explicitly requires an "evidentiary review" of the record as part of its prescribed harm analysis. *Almanza*, 686 S.W.2d at 174. The court of appeals, however, did not analyze the evidence or any other relevant portion of the record. Instead, it followed the lead of *Saunders v. State*, 913 S.W.2d 564 (Tex. Crim. App. 1995), and reversed Williams' conviction simply because "the jury charge permitted the jury to either convict Williams of continuous trafficking of persons or to acquit him altogether." *Williams*, at *24.

Saunders' holding does not mandate this outcome; rather, the court of appeals followed a passage of dicta in *Saunders*:

> In each of these cases we essentially recognized that "some" harm occurs because the jury was not permitted to fulfill its role as factfinder to resolve the factual dispute whether the defendant committed the greater or lesser offense. That the evidence the defendant was "guilty only" of the lesser included offense may not have been compelling was no more a consideration in our analysis of harm than it was in deciding that the trial court erred in failing to give the instruction in the first place. Given the rationale of *Beck* [*v. Alabama*, 447 U.S. 625 (1980)], this is hardly an inappropriate criterion for assessing harm.

Saunders, 913 S.W.2d at 571. The reasoning of this passage should not trump *Almanza's* standard. To the extent there is any conflict, this Court should reaffirm *Almanza*.

First, the reasoning in *Saunders* relies on *Beck v. Alabama*. However, the Supreme Court has previously distinguished *Beck* and noted that a significant factor in that decision was how "the death penalty was automatically tied to conviction." *Hopkins v. Reeves*, 524 U.S. 88, 98 (1998). Thus, *Beck's* applicability to non-death trials is uncertain at best. The stakes in Williams' trial were far lower than an automatic death sentence upon conviction.

Second, the whole point of a harm analysis is to prevent unwarranted reversals in cases where a jury was not likely influenced by the failure to include a proposed instruction. In other words, that the evidence "may not have been compelling," *Saunders*, 913 S.W.2d at 571, in the context of any given trial is the ultimate consideration under *Almanza*. *See Almanza*, 686 S.W.2d at 174 ("We hold that finding error in the court's charge to the jury begins—not ends—the inquiry; the next step is to make an evidentiary review along the lines of that described above in *Davis*, supra, as well as a review of any other part of the record as a whole which may illuminate the actual, not just theoretical, harm to the accused.").

This Court should disavow the dicta in *Saunders* that suggests that a defendant is harmed when the trial court's failure to submit a lesser leaves the jury "with the sole option either to convict the defendant of the greater offense or to acquit him." *Saunders*, 913 S.W.3d at 571. Contrary to the court of appeals'

opinion, the finding of error should only begin the analysis under *Almanza* and not result in an automatic reversal.

Along this line, in *Braughton v. State*, 569 S.W.3d 592 (Tex. Crim. App. 2018), this Court recently analyzed whether the failure to include a lesser-included offense instruction was harmless. This Court reviewed the charge as a whole, the evidence, and the arguments from counsel and concluded that the error was harmless under a "some harm" standard. *Id.* at 613–617. Yes, *Braughton* is distinguishable from the present case in that Braughton's instructions involved additional lesser-included offenses and other defensive issues that were all rejected by the jury, *id.* at 613–15; however, this Court did not treat any particular closing argument, or charge paragraph, or testimony of a given witness as dispositive of the analysis. Thus, unlike the dicta from *Saunders* cited by the court of appeals, *Braughton* is more faithful to *Almanza's* mandate and the court of appeals should have followed it in the present case.

Application: Williams was not harmed by the trial court's refusal to instruct the jury on human trafficking.

An examination of the record in accordance with *Almanza* should lead this Court to conclude that Williams was not harmed by the trial court's alleged error.

Entirety of the Jury Charge

Williams' jury charge defined continuous trafficking and required the jury to convict only if it believed that Williams trafficked B.F. for "a period that was thirty (30) or more days in duration" (C.R. at 383). The charge adequately instructs the jury the burden of proof rests with the prosecution (C.R. at 376). The charge gives a general instruction to the jury that it must acquit if the prosecution fails to prove "each and every element of the offense charged beyond a reasonable doubt" (C.R. at 377). The charge goes on to specifically instruct the jury to acquit Williams if it has a reasonable doubt that Williams trafficked B.F. from on or about December 22, 2013 through August 18, 2014 (C.R. at 383).

While the charge did omit the lesser offense of human trafficking, it did accurately charge the jury on continuous trafficking and it appropriately laid the entire burden on the prosecution to prove all elements, including the element that the defendant continuously traffic B.F. for a period greater than thirty days.

The State of the Evidence

Williams forcefully denied committing any offense (VI R.R. at 132–33, 168–69, 179, 188, 210, 225). At no point during the four days of evidence did Williams present a narrative that he was guilty of less than thirty days of trafficking. The evidence relied on by the court of appeals—the text message, the invoices, and the phone switch—were presented in the context of a denial and not as part of a narrative that Williams was only partially guilty.

The Jury Arguments

Williams did reference the text message and the phone switch during closing arguments (VII R.R. at 42–43). He also directed the jury's attention to his denial and his explanation as to why incriminating evidence was found on him (VII R.R. at 45). At one point Williams argued,

> A reasonable theory and a reasonable support of the evidence is that these two girls, [B.F.] and Ameia Cooper, were doing this together. Issac didn't know it.

(VII R.R. at 47). Williams' counsel made a reference to him and his childhood friend framing his dog for eating his father's pie (VII R.R. at 49–50). The analogy was clearly intended to advance the theory that Williams is a wholly innocent man, framed by B.F. and Cooper.

Williams' argument did not focus the jury's attention to the thirty day element of the charged offense or argue that the evidence was insufficient to establish that requirement. And, unlike a general defense or justification, a defendant can still request an acquittal with a straight face if the jury has a reasonable doubt that one element—the thirty day element—was not proven beyond a reasonable doubt by the evidence. That is to say, a defendant in Williams's shoes could have still argued, "the prosecution only proved that I trafficked for less than thirty days, so you must acquit."

In sum, Williams' argument was consistent with his presentation of evidence—a general and complete denial of criminal responsibility.

Any Other Relevant Information

Lesser-included offenses were sporadically discussed throughout trial; however, there was never a coherent theory offered to the court about which offense was supported by evidence.

The possibility of a lesser-included offense is mentioned in the record just before the beginning of voir dire, and outside the presence of the panel (II R.R. at 15–16). Williams acknowledged that he was applying for probation in the event that he was convicted of a lesser-included offense (C.R. at 360–62). Yet, during voir dire, Williams did not discuss possible lesser-included offenses with prospective jurors. He spent a fair amount of time discussing the requirement of "by any means" (II R.R. at 155–57). There is also some general discussion about jurors sticking to their convictions during deliberations.

In conversing with one prospective juror, Williams suggests that his accuser "made this up" (II R.R. at 168). Williams also questioned a juror about whether they could "leave room for the possibility that the 17-year-old might be smart enough to trap someone else into this when they get caught?" (II R.R. at 181).

At no time during voir dire did Williams question the jury about the law of lesser-included offenses and whether they could or would follow such an instruction at the conclusion of trial. In fact, his voir dire presentation hinted that he was an innocent man, falsely accused by a seventeen-year-old (II R.R. at 168, 181).

On day two of trial, Williams' counsel mentions that he might want some lesser-included offenses in the jury charge, but he did not indicate which offenses should be included (IV R.R. at 227). Unrelated "lesser-included offenses" (kidnapping and unlawful restraint) were mentioned briefly on day four when B.F. was recalled to the stand by Williams; however, not in the context of the trafficking for less than thirty days (VI R.R. at 58–59). Later that day, during a preliminary discussion on the jury charge, Williams' counsel stated, "And then, I was going to ask for a lesser included, but I don't know which ones exactly we have got evidence on after review of what was offered" (VI R.R. at 155). No specific lesser-included offenses were mentioned during exchange.

During deliberations, the jury sent out a note concerning venue and the thirty day requirement (C.R. at 392; VII R.R. at 63–66). It is apparent from the note and its context that the jury had no concerns of whether Williams trafficked B.F. for a period of thirty days or more; rather, the jury simply wanted the trial court to

clarify whether the venue provision required that she be trafficked for thirty days or more within Bexar County.

***Almanza* Factors Combined**

All these factors combined show that Williams never truly pursued a defense through a lesser-included offense. He pursued the lesser offense of human trafficking about as serious as he pursued the "lesser offense" of assault (VII R.R. at 7–8). The references to lesser included offenses in the record mostly occur outside the presence of the jury and they are not accompanied by any coherent narrative. To the contrary, Williams aggressively pursued a narrative that he was not guilty, period.

Given this record, the possibility that a jury would have returned a verdict on a lesser offense of human trafficking exists only in the realm of theory. And theoretical harm is not enough. *See French v. State*, 563 S.W.3d 228, 238 (Tex. App. 2018) (finding only theoretical harm in part because French did not offer a tailored defense that he only contacted the victim's sex organ and not her anus). Here, there is "no realistic possibility that the jury would have opted to convict" Williams of a lesser offense, mainly because Williams never during the presentation of evidence or argument presented them with that theory. *Braughton*, 569 S.W.3d at 617. He did not expressly argue that the State failed to prove the

thirty day element, and he did not implicitly invite the jury to acquit him because the evidence only proved trafficking for thirty days or less.

Because the record only establishes theoretical harm, the State respectfully asks this Court to reverse the court of appeals.

PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, the Petitioner-Appellee State respectfully requests that this Court reverse the judgement of the court of appeals and remand the case for consideration of Williams' remaining points of error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nathan E. Morey, assistant district attorney for Bexar County, Texas, certify that a copy of the foregoing petition has been delivered by email to Dayna L. Jones and the Office of the State Prosecuting Attorney on October 7, 2019 in accordance with Rules 6.3(a), 9.5(b), and 68.11 of the Texas Rules of Appellate Procedure.

CERTIFICATE OF COMPLIANCE

I, Nathan E. Morey, certify that, pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(B) and 9.4(i)(3), the above response, excluding the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix, contains 7,268 words according to the "word count" feature of Microsoft Office.

/s/ *Nathan E. Morey*

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